

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Plaintiff Ronald Scott Johnson proceeds through counsel in his appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's applications for Social Security Disability Insurance (DI) benefits and Supplemental Security Income (SSI) disability benefits after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the decision is REMANDED for further administrative proceedings consistent with this Order.

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FACTS AND PROCEDURAL HISTORY

Plaintiff was born on XXXX, 1961.¹ He has a high school education. Plaintiff's past relevant work was as an asphalt truck driver and logger.

Plaintiff applied for DI and SSI benefits on April 18, 2003. His application was denied at the initial level and on reconsideration, and he timely requested a hearing, which was held on April 20, 2006. (AR 309-36.) A decision was issued on June 23, 2006 finding plaintiff not disabled. (AR 12-20.)

Plaintiff timely appealed to the Appeals Council, which denied the request for review, making the ALJ's decision the final decision of the Commissioner. (AR 4-6.) Plaintiff timely appealed to this Court.

JURISDICTION

The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

DISCUSSION

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must be determined whether the claimant is gainfully employed. The ALJ found plaintiff had not engaged in substantial gainful activity since his alleged onset date. At step two, it must be determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff to have severe impairments consisting of degenerative disc disease, chronic liver disease, and hepatitis C.

¹ Plaintiff's date of birth is redacted back to the year of birth in accordance with the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

01 Step three asks whether a claimant's impairments meet or equal a listed impairment. The ALJ
02 found that plaintiff's impairments did not meet or equal the criteria for any impairment included
03 in the "Listing of Impairments". If a claimant's impairments do not meet or equal a listing, the
04 Commissioner must assess residual functional capacity (RFC) and determine at step four whether
05 the claimant has demonstrated an inability to perform past relevant work. The ALJ found plaintiff
06 had the RFC to lift and carry up to 20 pounds occasionally and 10 pounds frequently, to sit, stand,
07 and/or walk for 6 hours in an 8-hour workday with an option to sit or stand when performing the
08 job, with an unlimited ability to push/pull the above amounts. The plaintiff was able to climb ramps
09 and stairs occasionally, to balance, stoop, kneel, crouch, and crawl occasionally, as well as to
10 perform fine manipulation on an occasional basis, and was not limited in reaching in all directions
11 or handling, but must avoid exposure to vibration. With this functional capacity, the ALJ
12 concluded that plaintiff could not perform his past relevant work as an asphalt truck driver or
13 logger. If a claimant demonstrates an inability to perform past relevant work, the burden shifts
14 to the Commissioner to demonstrate at step five that the claimant retains the capacity to make an
15 adjustment to work that exists in significant levels in the national economy. The ALJ found that
16 plaintiff was capable of performing a significant number of jobs in the national economy, including
17 the job of cashier. Therefore, plaintiff was found to be not disabled.

18 This Court's review of the ALJ's decision is limited to whether the decision is in
19 accordance with the law and the findings supported by substantial evidence in the record as a
20 whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more
21 than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable
22 mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750

01 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's
02 decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir.
03 2002).

04 Plaintiff argues that the ALJ did not properly assess his credibility, gave insufficient weight
05 to the results of a performance-based physical capacity evaluation and the attending physician's
06 opinion in that regard, improperly determined that he was capable of performing light work, and
07 erred in finding that certain non-exertional limitations did not significantly erode plaintiff's
08 occupational base. The Commissioner responds that the ALJ's decision was supported by
09 substantial evidence, was free of legal error, and should be affirmed.

10 For the reasons set forth below, the decision is remanded for further administrative
11 proceedings as described herein.

12 Credibility Assessment

13 Plaintiff argues that the ALJ failed to provide clear and convincing reasons for rejecting
14 his testimony about his ability to work more than four hours per day.

15 The ALJ discussed plaintiff's testimony about his limitations as follows:

16 The claimant testified that he could not work due to constant headaches that
17 interfered with his thinking, as well as problems with his low back, which felt
18 sometimes like a knife sticking in his back. He testified that it was aggravated by
sitting, cutting firewood, or long drives. The claimant claimed that his legs and hands
did not work sometimes and also complained of neck pain.

19 As noted above, Dr. Quint questioned the claimant's effort on examination, and Mr.
20 Crowley suspected symptom magnification. These suspicions, especially the fact that
two providers suspected this, sheds great doubt on the claimant's credibility.

21 I also find that the claimant's activities show that he is more active than he alleges.
For example, the claimant told Dr Quint in September of 2003 that he fished, hunted,
22 and worked in the garden. He said he did these activities for food, implying that he

01 performed them regularly. In September of 2004, the claimant reported that he used
 02 a riding lawn mower for approximately 30 minutes each week, although he claimed
 03 that it disturbed his back and neck. He also reported grocery shopping, even in large
 04 stores, pushing a cart. He reported carrying bags lifting as much as 20 pounds, but
 05 not lifting them above waist level. The claimant also reported that he had a horse,
 which he infrequently rode. He testified that he cut firewood. I find that, despite the
 claimant's stating that these activities aggravated his back condition or that he was
 only able to do them infrequently, the very fact that he attempts them at all shows that
 his functioning is not impaired to the degree he alleges.

06 I therefore find that, while the claimant might believe himself to be too impaired by
 07 his symptoms to perform work related activities, the evidence shows that, despite his
 08 impairments, the claimant is able to function at a level that would allow him to
 perform work related activities. Accordingly, I find that the claimant's assertions
 regarding the degree his impairments limit his functioning cannot be fully credited.

09 (AR 15-16, internal citations to record omitted.)

10 In making a finding about the credibility of a claimant's reported symptoms, the ALJ need
 11 not totally accept or totally reject the individual's statements. Based on a consideration of all of
 12 the evidence in the case record, the ALJ may find "all, only some, or none" of a claimant's
 13 allegations to be credible. Social Security Ruling (SSR) 96-7p (available at 1996 WL 374186 at
 14 *4). In this case, the ALJ did not reject plaintiff's testimony entirely, but found that his statements
 15 "regarding the degree his impairments limit his functioning" could not be fully credited. (AR 16.)
 16 The ALJ found that plaintiff did have severe impairments that affected his ability to perform work-
 17 related functioning, and set forth specific functional limitations based on "the entire record,
 18 including the claimant's allegations of disabling symptoms and limitations, and the extent to which
 these allegations are consistent with the objective medical evidence and other evidence." *Id.*

19 In considering a claimant's testimony, the ALJ may utilize "ordinary techniques of
 20 credibility evaluation". *Smolen v. Chater*, 80 F.3d 1273, 1284 (9th Cir. 1996) . The ALJ "is
 21 entitled to draw inferences logically flowing from the evidence." *Sample v. Schweiker*, 694 F.2d
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01 639, 642 (9th Cir. 1982). The consistency of a claimant's statements, both internally and with
02 other information in the case record, is considered a "strong" indication of his or her credibility.
03 SSR 96-7p (available at 1996 WL 374186 *5). A claimant's subjective complaints may be
04 discredited based on inconsistencies between his complaints and his daily activities, and failure to
05 give maximum or consistent effort during a physical capacity evaluation can also be a strong
06 indication of lack of credibility. *Thomas*, 278 F.3d at 959 . If the ALJ's credibility finding is
07 supported by substantial evidence, we will not engage in second-guessing. *Id.*

08 The Commissioner argues that the ALJ provided clear and convincing reasons supported
09 by substantial evidence for finding plaintiff's allegations regarding his limitations not entirely
10 credible. Such evidence, the Commissioner points out, includes the fact that Dr. Quint took note
11 of plaintiff's poor effort on examination and the physical therapist's suspicion of symptom
12 magnification. The Commissioner also cites the ALJ's discussion of plaintiff's self-report of his
13 exertional capacity in the September 2004 performance-based physical capacities evaluation in
14 which plaintiff, *inter alia*, reported the ability to lift grocery bags weighing as much as 20 pounds.

15 However, plaintiff correctly points out that the ALJ misread the physical capacity report.
16 Instead of reporting his ability to carry a grocery bag weighing 20 pounds, plaintiff reported his
17 ability to carry a grocery bag "approximately 20'", or, in other words, 20 feet. (AR 204.)
18 Harmless error can be found if it is clear from the record that an ALJ's error was "inconsequential
19 to the ultimate nondisability determination". *Stout v. Commissioner*, 454 F.3d 1050, 1055 (9th
20 Cir. 2006.) Although the ALJ cited other reasons for not finding plaintiff's testimony completely
21 credible, the misconstrued comment by plaintiff about his lifting abilities was a central component,
22 and cannot be said to be harmless.

01 This is not a case where the Court should apply the “crediting as true” theory and credit
02 plaintiff’s testimony as a matter of law. *See Connett v. Barnhart*, 340 F.3d 871, 876 (9th Cir.
03 2003) (courts retain flexibility in applying the “crediting as true” doctrine). The ALJ cited other
04 potentially legally sufficient reasons, supported by substantial evidence in the record, that could
05 support a finding that plaintiff’s testimony was not entirely credible. As such, the ALJ should re-
06 assess plaintiff’s credibility on remand, providing references to the administrative record that
07 support the conclusions.

Physical Capacity Evaluation

09 Plaintiff challenges the ALJ's failure to give more than little weight to the Performance-
10 based Physical Capacities Evaluation" ("PCE") conducted on September 14, 2004 by Northwest
11 Physical Therapy Sports Rehabilitation Center, Inc., P.S. (AR 204-217), or to the opinion of
12 treating physician Dr. Benz, who initially assessed plaintiff with a greater physical capacity, then
13 later lowered her assessment after being informed by plaintiff of the results of the PCE. (AR 279.)

14 In assessing plaintiff's functional capacity, the ALJ referenced the PCE:

15 My assessment differs from the physical capacity examination performed on
16 September 14, 2004 by physical therapist Dan Crowley. I have considered this
17 opinion but give it little weight because the therapist suspected symptom
18 magnification on the claimant's part. I might give the claimant the benefit of the
19 doubt if this were the only suspicion regarding his performance, but it is not. As noted
20 above, Dr. Quint felt that the claimant had given poor effort when he tested him,
21 which tends to confirm Mr. Crowley's suspicious and sheds doubt on his conclusions,
as his evaluation was based on large part on the claimant's effort. I also note that the
claimant told Mr. Crowley that he could lift as much as 25 pounds, and said that he
regularly lifted 20-pound grocery bags. Yet on examination, the claimant was found
only capable of lifting 10 pounds on an occasional basis. I also note that the
claimant's gait differed during the visit with Dr. Quint, implying that the claimant
functions differently when he feels his functioning is evaluated.

22 My assessment is consistent with that of Dr. Quint. I give great weight to this opinion

because the doctor both examined and tested the claimant's functional abilities.

My assessment is also supported by the opinion of Dr. Benz, who consistently found that the claimant was able to lift 25 pounds occasionally, 15 pounds frequently, with no repetitive or prolonged bending, stooping, kneeling, squatting, climbing or prolonged walking, standing, or sitting. She changed that assessment after the physical capacity examination performed by Mr. Crowley, but I give little weight to that assessment, as discussed above. I find that Dr. Benz's assessment, based on her observation of the claimant over time, clinical examination, and objective imaging, was more [sic] a more accurate assessment of the claimant's functioning.

My residual functional capacity assessment is supported by the conclusions of the state agency medical consultants with Disability Determination Services (DDS), who reviewed the record in connection with the initial and the reconsideration determinations below and concluded that the claimant was not disabled. Findings of fact made by state agency medical and psychological consults are considered expert opinion evidence from non-examining sources.

(AR 16-17, citations and internal citations to record omitted.)

The ALJ is responsible for determining credibility and resolving conflicts in the medical testimony. *Magallanes*, 881 F.2d at 750 (citing *Allen v. Heckler*, 749 F.2d 577, 579 (9th Cir. 1984)). The ALJ may reject the opinion of a treating physician whether or not that opinion is contradicted. *Id.* at 751. Where not contradicted by another physician, a treating or examining physician's opinion may be rejected for "clear and convincing" reasons. *Lester v. Chater*, 81 F.3d 821, 830 (9th Cir. 1996) (quoting *Baxter v. Sullivan*, 923 F.2d 1391, 1396 (9th Cir. 1991)). Where contradicted, a treating or examining physician's opinion may be rejected if "'specific and legitimate reasons' supported by substantial evidence in the record for so doing" are provided. *Id.* at 830-31 (quoting *Murray v. Heckler*, 722 F.2d 499, 502 (9th Cir. 1983)).

Plaintiff points to other portions of the medical records that he contends are supportive of his argument that greater weight should have been given to the PCE, as well as Dr. Benz's

01 agreement with it.² Plaintiff admits that Mr. Crowley did question the appropriateness of his pain
 02 behavior, but notes that Mr. Crowley also selected some of the positive comments in the check-
 03 the-box portion of the form and declined to check some of the negative comments. (AR 209.)
 04 Plaintiff points to an earlier evaluation by Dr. Quint and several examinations by other treatment
 05 providers showing decreased sensation in plaintiff's lower extremities.

06 Plaintiff essentially invites this Court to re-weigh the evidence. However, it is not the
 07 function of the reviewing court to determine *de novo* whether the social security claimant is
 08 disabled. *Parker v. Harris* , 626 F.2d 225, 231 (9th Cir. 1980). The ALJ provided other, legally
 09 sufficient reasons for giving more weight to the opinion of Dr. Quint than to Mr. Crowley's PFC,
 10 as well as Dr. Benz' suggested agreement with it. However, again, because the ALJ did make
 11 reference to plaintiff's misinterpreted practice of lifting 20 pound grocery bags (AR 17), on remand,
 12 the ALJ should clarify the relative importance given to this factor in weighing the September 2004
 13 PCE.

14 Plaintiff's Ability to Work

15 Plaintiff sets forth as a separate assignment of error the contention that the ALJ erred in
 16 finding him able to work more than four hours a day. In support of that contention, plaintiff cites
 17 SSR 96-8p, which defines "regular and continuous" work as eight hours a day for five days a week.
 18 SSR 96-8p (available at 1996 WL 374184). Plaintiff contends that the ALJ failed to consider his

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 20 ² A careful reading of Dr. Benz' chart note draws into question the interpretation that Dr.
 21 Benz was affirmatively adopting the PCE evaluation as her own findings. Rather, it appears that
 22 she was simply noting the results of the PCE as related to her by the plaintiff. (AR 270 ("Mr.
 Johnson returns stating that he underwent his PCE evaluation last mo. It was felt that he could
 not work more than a 4hr workday...Mr. Johnson remains on light duty and per the PCE, can lift
 10# occasionally and 5# frequently.")) (emphasis added.)

01 inability to perform work activities on a regular and continuing basis as a result of his persistent and
02 continuing pain due to his medical conditions.

03 Although phrased as a separate assignment of error, this argument is essentially a re-
04 statement of plaintiff's contention that the ALJ failed to properly assess his credibility. The ALJ's
05 reassessment of plaintiff's credibility on remand will address this assignment of error.

06 Step Five Determination

07 The ALJ found that plaintiff was unable to perform his past relevant work as an asphalt
08 truck driver and logger. Therefore, the ALJ proceeded to determine whether other jobs exist in
09 significant numbers in the national or regional economy that plaintiff can perform, acknowledging
10 that the burden of this showing was the Commissioner's. (AR 17-18.)

11 The Medical-Vocational Guidelines (or the "grids"), 20 C.F.R. § 404, Appendix 2 to
12 Subpart P, § 200.00, provide Rules utilizing data from the Dictionary of Occupational Titles (DOT)
13 to classify jobs by their exertional and skill levels. If the findings of fact made by the ALJ as to the
14 claimant's functional capacity are the same as the applicable Rule, the grid is used to decide whether
15 a person is disabled. 20 C.F.R. §§ 404.1569, 416.969. The ALJ can use the grids to evaluate the
16 disability of a claimant asserting "both exertional and non-exertional limitations", unless the non-
17 exertional limitations are "sufficiently severe" so as to significantly limit the range of work permitted
18 by the exertional limitations. *Hoopai v. Astrue*, ___ F.3d ___, No. 05-16128, 2007 WL 2410178
19 at *4 (9th Cir. Aug. 27, 2007). In such an instance, the assistance of a vocational expert is required.

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21 In considering plaintiff's ability to perform other jobs in the national economy, the ALJ
22 found as follows:

01 At all times relevant to this decision, the claimant was a “younger person” under the
02 regulations. He has a high school education and some semi-skilled work experience,
03 but none of the claimant’s skills acquired from prior work would transfer to any work
04 that he is now capable of performing.

05 In this case, Rule 202.21 [of the grids] applies and would ordinarily direct a finding
06 of “not disabled” for someone with the claimant’s vocational profile who was capable
07 of performing the full range of sedentary work. While claimant’s capacity to perform
08 the full range of sedentary work is further diminished by additional, nonexertional
09 limitations, I find that these limitations do not significantly erode the number of jobs
10 represented in the occupational base of sedentary work.

11 This conclusion is consistent with the testimony of the vocational expert, who testified
12 at the hearing that a hypothetical individual as described above would be capable of
13 making an adjustment to work in the following job: cashier II, DOT #211.462-010,
14 which is light, unskilled work, SVP 2, of which there are 900,000 jobs in the national
15 economy and 19,000 in Washington. She explained that, although this job is classified
16 as light work, it is commonly known that a fair percentage of these jobs allow them
17 to be performed while sitting, with fingering at an occasional basis. The vocational
18 expert testified that her testimony was otherwise consistent with the Dictionary of
19 Occupational Titles and its companion publications. *See* S.S.R. 00-4p.

20 I find this testimony to be reasonable and find that these numbers represent a
21 significant number of jobs. I find that the claimant, likewise, is capable of making [a]
22 vocational adjustment to work that exists in significant numbers in the national or
regional economy, in the above jobs.

(AR 18, internal citations omitted.)

23 Plaintiff takes issue with the ALJ’s conclusion that the limitations on his functional capacity
24 did not significantly erode the occupational base of sedentary work. Specifically, plaintiff argues
25 that the vocational expert’s testimony was overly vague in stating that a “fair percentage” of cashier
26 positions are sedentary (as opposed to light) and that “some” cashier positions require occasional
27 fingering and “some” require frequent fingering. Therefore, plaintiff argues, the ALJ’s conclusion
28 that he could perform “a significant number” of jobs in the national economy lacked substantial
29 evidence.

01 Plaintiff's contention is well taken. Although the vocational expert testified that 900,000
02 cashier jobs exist nationally and 19,000 in Washington state (AR 330-332), this number included
03 all cashier jobs, not just the "fair percentage" that allow sitting and the "some" that only require
04 occasional fine manipulation. The matter should be remanded to obtain clarification from the
05 vocational expert as to the number of cashier jobs available in the national or regional economy that
06 fit plaintiff's RFC.

07 Plaintiff also argues that the ALJ failed to consider vocational aptitude testing that showed
08 his lack of aptitude for cashiering. The Commissioner correctly points out that the ALJ is not
09 required to discuss all the evidence presented, so long as she explains why "significant probative
10 evidence has been rejected." *Vincent v. Heckler*, 739 F.2d 1393, 1394-95 (9th Cir. 1984) (citing
11 *Cotter v. Harris*, 642 F.2d 700, 706 (3d Cir. 1981)). As the vocational expert testified, the skills
12 assessments were not relevant to evaluating aptitude for an unskilled job such as the cashier
13 positions. (AR 333-34.)

14 Conclusion

15 This case is remanded for further administrative proceedings. On remand, the ALJ should
16 reassess plaintiff credibility, clarify the consideration of the September 2004 Physical Capacity
17 Evaluation, and obtain sufficiently specific testimony regarding the number of jobs existing in the
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20 national or regional economy that plaintiff is capable of performing.

21 DATED this 5th day of October, 2007.

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Mary Alice Theiler
United States Magistrate Judge

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